APPEAL NO. 93035

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On December 23, 1992, a contested case hearing was held in (city), Texas, with (hearing offier) determining that respondent, claimant herein, reached maximum medical improvement (MMI) on October 15, 1992, (determined by the designated doctor) with 2% impairment (determined by another doctor). Appellant, carrier herein, asserts on appeal that the medical evidence contrary to the impairment rating of the designated doctor does not comprise the "great weight" of the medical evidence and that the designated doctor's opinion should be used for both MMI and impairment rating. Claimant responds by saying that the MMI date set by the designated doctor is in error and that the impairment rating set by a doctor obtained by the carrier is also in error; claimant maintains that his treating doctor's opinion is correct as to both questions. Claimant further asks that rules be enforced so that his treating doctor's rating of 12% impairment be awarded, and claimant attaches a TWCC Form 69 dated December 30, 1992.

DECISION

Finding that the hearing officer has not shown why the great weight of medical evidence is contrary to the designated doctor's opinion in regard to the impairment rating of claimant, we reverse and remand as to the rating but affirm as to the MMI date found by the hearing officer, which was based on the designated doctor's opinion.

Claimant worked for a landscape company when on (date of injury), he fell and broke his left hip, which had been previously fractured. He underwent surgery in September 1991. At the hearing, claimant testified that his treating doctor since June 1991 has been (Dr. W), who performed his surgery. The rest of claimant's testimony was limited to a description in detail of all the tests that Dr. W had performed on him in assessing an impairment rating (although Dr. W had not found MMI at the time of hearing) and contrasting that examination with the limited testing done by both (Dr. O), the designated doctor, and (Dr. S), the doctor selected by the carrier.

The carrier takes issue on appeal with Finding of Fact No. 5 that said Dr. O's impairment rating of 0% impairment was contrary to the great weight of other medical evidence. As the carrier suggests, the Appeals Panel has stated that the "great weight" of other medical evidence must be contrary to the designated doctor's report to overcome it. *See* Texas Workers' Compensation Commission Appeal No. 92412, dated September 28, 1992. In addition, the Appeals Panel has also emphasized that when a hearing officer views other medical evidence as being contrary to the great weight, the reasons why such a conclusion is reached should be specified. *See* Texas Workers' Compensation Commission Appeal No. 92522, dated November 9, 1992. *Finally*, Texas Workers' Compensation Appeal No. 92561, dated December 4, 1992, indicated concern for using MMI from one doctor and impairment rating from another, although it did not say the two could not be individually

considered. In the case on review, neither the discussion of the evidence in the hearing officer's opinion nor the findings and conclusions themselves give any indication why the hearing officer chose to find that Dr. O's impairment rating was contrary to the great weight of the other medical evidence. As noted above, claimant's testimony that was critical of Dr. O's examination was equally as critical of Dr. S's examination; it was Dr. S's impairment rating that was used when the hearing officer rejected Dr. O's. The remedy used in Appeal 92522, *supra*, was a remand, which is also appropriate here.

In addition, the claimant in its response to the appeal criticized the examinations of both Dr. O and Dr. S and asked that both of their opinions be given no weight since there was evidence that they did not perform certain tests described in the second printing, dated February 1989, of the Guides of the Evaluation of Permanent Impairment, third edition, published by the American Medical Association (Guides). (Since the claimant's response was placed in the US mail within 15 days of its receipt of the hearing officer's decision and since the response was received at the Commission within 20 days,

issues in the response may be treated as appellate issues.) The Guides, however, only address an impairment rating and do not provide standards for determining when MMI has been reached. Whether a particular doctor should have performed a certain test or not as to impairment does not necessarily affect attainment of MMI. The claimant's treating doctor, Dr. W, does not indicate that additional tests, rehabilitation, or surgical procedures are necessary prior to reaching MMI. On the contrary, Dr. W, in an evaluation dated December 16, 1992 says he expects MMI to be reached by December 22, 1992. While an estimate of a future date of MMI is not an opinion that a claimant has reached MMI, (*see* Texas Workers' Compensation Commission Appeal No. 92198, dated July 3, 1992), Dr. W's estimate that MMI will be reached within eight days would be difficult to characterize as the "great weight of other medical evidence" contrary to the designated doctor's opinion that MMI had been reached. The hearing officer's determination that MMI was attained on October 15, 1992, as reported by the designated doctor, is sufficiently supported by the evidence.

Both at the hearing and on "appeal" the claimant attacked the lack of testing in regard to impairment assessment, performed by both doctors who found that MMI had been reached. The claimant described the designated doctor, Dr. O, as spending about 10 minutes with him in the examining room. He testified that his leg was lifted by Dr. O to "about 25 or 30" degrees but no measuring devices were used. Dr. O's limited narrative that accompanies the TWCC 69 only comments about claimant's motion by saying, "(h)e has severe pain on active or passive motion of the left hip." This recitation is much more brief than that provided by claimant's treating doctor. What effect, if any, claimant's testimony had on the finding that medical evidence was contrary to the great weight of the designated doctor's impairment rating is unknown because of the absence of any explanation therefor, as stated above.

While the standard of presumptive weight to be given a Commission-selected designated doctor's impairment rating is similar to that directed at MMI (both require that the great weight of other medical evidence be to the contrary to overcome the designee and Article 8308-4.25(a) requires an "objective clinical or laboratory finding" to assess an impairment), the definition of neither "impairment" nor "impairment rating", found in Article 8308-1.03(24) and (25), contains the requirement that it be "based on reasonable medical probability" as does the definition of MMI, found in Article 8308-1.03(32), all in the 1989 Act. Even in regard to MMI, the Appeals Panel has said, "a claimant may attack a finding of maximum medical improvement. . .by pointing out defects in a certification of maximum medical improvement." *See* Texas Workers' Compensation Commission Appeal No. 92164, dated June 5, 1992. With claimant's testimony that specific testing procedures, apparently called for by the Guides at pages 60-65 thereof, were not accomplished and with the designated doctor's report containing so little detail as to how the evaluation was conducted, the hearing officer would not be remiss in this instance to seek medical evidence clarifying the designated doctor's evaluation of impairment. *See* Texas Workers' Compensation Commission Appeal No. 92617, dated January 14, 1993, in which the hearing officer sought a new report from the designated doctor based on the hearing officer's findings made at the hearing. Because it may be possible that specific range of motion tests should at least be attempted in regard to particular injuries, medical evidence in regard to what tests, if any, were required by the Guides in this case may also be sought upon remand. *See* Texas Workers' Compensation Commission Appeal No. 92335, dated August 28, 1992, which points out that certain range of motion testing may be rendered invalid.

With claimant's response (which qualified as an appeal) was medical information dated December 30, 1992. This information was generated after the hearing and was not considered by the Appeals Panel. *See* Texas Workers' Compensation Appeal No. 92156, dated June 1, 1992.

The decision and order are affirmed in regard to the determination that MMI was reached on October 15, 1992, but reversed and remanded for the development of medical evidence as to the impairment rating and, if an impairment rating other than that of the designated doctor is found to be appropriate, to explain the basis for that finding. Reconsideration and additional or different findings may also be appropriate, consistent with this opinion, based on the medical evidence forthcoming. Pending resolution of the remand, a final decision has not been made in this case. A party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which the new decision is received.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge